Responses of the Association of Costs Lawyers to Ministry of Justice's Consultation on the proposed transfer of all civil legal aid bills of costs to the Legal Aid Agency

May 2021

OUR BACKGROUND

The Association of Costs Lawyers (ACL) is a membership organisation representing Lawyers, students and retired practitioners in the field of legal costs.

ACL was founded in 1977 as the Association of Law Costs Draftsmen (ALCD) with the aim of promoting the status and interests of its members. In 2007, Fellows of the ALCD were granted the right to conduct costs litigation and rights of audience.

In 2011 the ALCD was renamed as the Association of Costs Lawyers (ACL) and became the statutory regulator of qualified costs practitioners. In line with the Legal Services Act, the ACL delegated regulatory obligations to the Costs Lawyers Standards Board (CLSB).

There are currently 548 members of the ACL who represent both paying and receiving parties in all forms of costs litigation. Many members also act for Litigants in Person and the ACL is committed to delivering better access to justice in all costs related matters. All of our members have experience in costs disputes and the vast majority deal with costs on a day-to-day basis.

The preparation of this response has been supported in particular by the ACL Legal Aid Group (ACL LAG). The ACL LAG is the special interest group for ACL members who provide services in costs incurred under legal aid both payable by the LAA and other parties. The ACL LAG both represents the interests of those Costs Lawyers and provides support and assistance to them. The ACL LAG is also a member of the LAA Civil Contract Consultantive Group (CCCG), the Specialist Practitioners Group (SPG) chaired by the Law Society, and the LAA Care Case Fee Scheme Focus Group and Family High Costs Working Group - PET. The ACL LAG has been a key consultee of the LAA Costs Assessment Guidance consulations since 2014 and also provides feedback to the LAA Finance Team on its draft guidance.

We recognise the importance of this issue to our members and have drawn on the specialist knowledge and experience of the ACL LAG in preparing this response. This response is the result of their work and has been approved by ACL Council. It is neither meant to represent their personal opinions or those of the individual membership of ACL Council. It is intended to reflect the anticipated views of the membership who, with their wide ranging experience in all matters relating to costs, will be able to add substantial context to the consultation.

DO YOU AGREE WITH OUR PROPOSAL TO TRANSFER THE ASSESSMENT OF ALL COURT ASSESSED BILLS TO THE LAA? PLEASE GIVE REASONS FOR YOUR VIEW.

In short, no. The ACL has followed the developments in respect of the proposed assessment of all legal aid matters by the LAA and the ACL has a number of concerns with the substantive content and practicality of the proposal. Such concerns have also given rise to the process in which the proposal was reached and consulted upon and can be broken down into the following five broad areas covering the themes of due process, public policy/ethical concerns and finally the implementation of the proposal:

1. The Consultation Document and the consultation process
2. Lack of independence/conflict of interest of the LAA
3. Lack of a substantive process
4. Capacity of the LAA
5. Lack of experience in case workers undertaking the assessments.

In considering the proposals within the consultation, it is important to keep in mind what an assessment of legal costs requires. The assessment of legal costs is broadly split into two categories: liability and quantum. Liability is determined by the terms of contract a legal representative enters into with their client and/or funder. Quantum is determined with reference to what is deemed to be reasonable in the circumstances of the case, but these sums are restricted by the terms of the contract for legal services.

There has been judicial assessment of costs in England since the 13th Century. It covers many aspects, not least costs payable to one party by another (inter partes costs). These assessments facilitate the fees shifting model (commonly, although not exclusively, used in civil litigation), disputes about a client's own costs with their solicitor and costs of protected parties, where this area of law is continually analysed and developed in the same way as all other areas. The assessment of civil legal aid costs is supposed to mirror the same approach made in inter partes costs assessment and relies upon the same court procedure rules to establish the correct level of quantum.

In the majority of non-legal aid only costs assessments, the issue of liability under the contractual terms is insignificant, if an issue at all; most lawyers are careful not to create overly complex retainers which will lead to frequent problems, as was experienced by conditional fee agreements made between 2000 and 2005 leading to the revocation of the burdensome regulations which applied to them. However, the LAA, and its predecessor, has created a scheme so complex that the National Audit Office agreed this was a key reason for payment errors[1], but does not seem to have taken some key practical steps to assist the courts in avoiding these on assessments. It is compliance with the contractual terms which the LAA's consultation documents show it focuses its priority on and neglects the need for consistent and fair assessment of quantum; there are further voluminous guides, in addition to the Costs Assessment Guidance, produced by the LAA for its caseworkers, but the requirement for assessing quantum of costs is lengthy experience and knowledge about both the cases generating the costs and generic costs law.

Bills concerning matters concluded before the Magistrate(s), where proceedings are not commenced, or up to £2500 where they are, have to be assessed by the LAA (before 2003 the mandatory limit was £500, with the option for solicitors to submit bills up to £1000). Since 2000, the LAA has been responsible for agreeing budgets on cases exceeding £25,000 and assessing the costs thereon. Currently, claims which are assessed by the Court cannot then be assessed by the LAA[2]; the LAA simply check the claims to ensure that they are within scope of the funding certificate. The assessment process requires a different skill set as detailed further on in these representations.

1. THE CONSULTATION DOCUMENT AND THE CONSULTATION PROCESS

The ACL has significant concerns over the format and process of the current consultation being run by the LAA. It appears that the LAA/MOJ have failed to adhere to a number of the Government's Consultation Principles. It is important to consider these concerns from the outset because they have a significant impact on how the process has been handled to date and continues to be handled.

[1] National Audit Office, 2010
[2] 14.6 of the Standard Civil Contract 2018

It is imperative that the Consultation Principles are adhered to, especially in respect of policy decisions relating to legal aid. The provision of legal aid is a mechanism for ensuring that the most vulnerable in society are afforded access to justice. To make decisions without a proper basis in respect of legal aid can significantly restrict and hinder access to justice.

The summation of these concerns detailed below is that the ACL cannot see how any form of decision can be made based on the failure to consult on the proposal properly and thoroughly.

Background of the Consultation

To appreciate the concerns raised by the ACL it is important to understand the background to the present consultation. The LAA announced in late May 2020 that they had received HMCTS approval to bring all assessments in-house. Then, on the 2 June 2020, the LAA launched a 14-day contract consultation exercise on the operational implementation of this proposed change. This 'consultation' was merely about the implementation of the change and did not provide any form of consultation relating to the actual decision itself to bring assessments in-house.

It was not until the Law Society lodged a judicial review regarding the decision taken that any alternative to the proposal was considered. The judicial review resulted in a settlement being reached between the Law Society and the LAA for a fresh consultation to take place on whether civil bills should be assessed in-house by the LAA in future, rather than by specialist costs judges / officers and associated arrangements. Furthermore, as part of the settlement the LAA introduced an interim 'hybrid' system which allowed practitioners the option of where they wished to have their bills assessed and, if opting to have a bill assessed by the LAA, then the option to seek a fresh assessment of their bills by the Court if they are displeased with the outcome of the LAA assessment.

Failure to adhere to the Consultation Principles.

B. Consultations should have a purpose.

In light of the background of the consultation set out above the approach adopted by the LAA has resulted in this core principle being flagrantly ignored. The LAA has clearly demonstrated in their previous actions that they have already reached a decision in respect of the proposal and have only prepared this consultation as a result of the judicial review brought by the Law Society to go through the motions of what was agreed.

The Guidelines clearly state that consultations should take place when plans are at a formative stage and not ask questions about issues on which a final view has already been reached. The ACL considers the Consultation to be devoid of any consideration of any alternatives save for the transfer of the assessments wholly to the LAA. As a result of the judicial review the hybrid scheme referred to above is in place, yet this is not considered throughout the Consultation as a possible alternative to address all of the issues and concerns raised by the LAA and stakeholders.

C. Consultations should be informative.

The Consultation is found to be lacking substance in significant areas which raises concerns over its validity. As part of this principle, a consultation should include 'validated impact assessments of the costs and benefits of the options being considered'. Unfortunately, there is no formal costs/benefit analysis provided within the consultation document and further

information that has been provided. The Consultation references the costs of the court assessments to the LAA but has failed to provide any costings of the likely costs that the LAA will incur when assessing the bills 'in-house'. Without any form of a comparative figure, it is impossible for any conclusions to be drawn and undermines the entirety of the consultation basis.

Similarly, the consultation document has failed to address any of the concerns over how the proposal could actually be implemented. Furthermore, the Consultation is littered with inaccuracies and incorrect assumptions (these will be addressed below).

F. Consultations should be targeted.

The Consultation is comprised of four questions in total, three of which look at the impact on stakeholders and in particular from an equalities and family perspective. Given the contents of the Consultation it appears that it fails to actually provide information and explanation to the core users and recipients of legal aid and as such fails to consider in any detail the impact of the proposal on access to justice.

I. Consultation should facilitate scrutiny.

The Consultation is formed of only one specific question/proposal: do you agree with the conclusions reached by the LAA and MOJ? There are no questions relating to whether there is any immediate cause of concern which the proposed change would rectify and it fails to consider and invite any alternatives other than the proposed change. This fails to provide any sort of platform to scrutinise the decision that has been made.

The open question encourages a wide breadth of responses which are not directed at all to pertinent issues to be addressed through the consultation process. This is ultimately designed to obfuscate the real issues that are required to be dealt with.

2. LACK OF INDEPENDENCE/CONFLICT OF INTEREST OF THE LAA

The lack of neutrality of the body assessing claims between £2,500-£25,000 is of grave concern for a number of reasons:

i. The public body who pays the costs ("the paying party") to providers/counsel ("the receiving party") assessed as reasonable is the same body tasked with determining the assessed figure, bound by its own internal targets regarding both processing and expenditure.

ii. That body had been an executive non-departmental public body of the Ministry of Justice but in April 2013 responsibility passed to an executive agency of the Ministry of Justice, without real legal and constitutional separation from ministerial control but rather directly accountable to government ministers.

iii. The appeals process is not remunerated, and the receiving party has no direct access to the Independent Costs Assessor ("adjudicator"), who is chosen and paid by the paying party who is the conduit for all material and communications to that adjudicator. Appeal bundles are not agreed and although the receiving party is supposed to be notified of further representations made by the paying party to the adjudicator and copies made available, and be given a right to reply, it is known that this does not always happen. Similarly, if the paying party makes further

representations after the receiving party's reply to their initial representations, the receiving party is not sent a copy of them, there is also no requirement upon the paying party to do so. Adjudicators' decisions are not always sent to the receiving party but paraphrased by the paying party, who asserts what the outcome is based on their own paraphrasing instead.

iv. The amount of remunerated appeals work given to the adjudicator is decided by the paying party. It is not well paid; £52 p/h or where a 3-person panel is convened, £143.55-£180.85 each per half day. This has meant that not enough can be recruited to maintain the desired size of pool of knowledge and diversity. There is no requirement for the paying party to equally distribute appeals among adjudicators; if the paying party does not like the decisions the adjudicator is making then there is no requirement on the paying party to continue referring appeals to them. Adjudicators are limited to 10 years (two 5-year terms) after which they cannot continue in their role.

Decisions from adjudicators have often been known to be poorly worded and with basic facts about the case recorded incorrectly, indicating that there are inappropriate time pressures on them to complete the work.

The safeguarding process severely lacks oversight and transparency.

3. LACK OF A SUBSTANTIVE PROCESS

Paragraph 27 of the consultation states that LAA assessment will help "reduce the number of bills which are rejected and help to ensure correct rate submissions for legal aid providers". The Consultation document and letter to the HMCTS dated 1st April 2021 from LAA Head of Civil Case Management, Alistar Adan, say that the process is 'entirely digital' but does not confirm what the process will actually be going forward.

The interim arrangements allow providers the option of submitting either a paper-based court assessment bill of costs or Claim 1 form via a summary line claim on the LAA's online platform, the Client and Costs Management System (CCMS), or an electronic full line by line CCMS claim. It is not accepted that the current process (CCMS) is "entirely digital": by its own motion, the LAA decided to accept paper-based bills which were/are eligible for court assessment. The current process of accepting paper-based bills reflects HMCTS's e-filing system which is used by the SCCO who deal with all legal aid bills from cases in the London Family Courts as well as the High Court (including Court of Protection), Upper Tribunals and Court of Appeal, and some London County Courts which refer assessments to the SCCO. The e-filing system is expected to roll out to the rest of the jurisdiction in due course.

With regards to the digitised system, the only thing it appears to do is allocate pre-set rates from a matrix (whether the rate allocated is correct is not always guaranteed in less common types of cases. Further, CCMS only allocates the rates for profit costs, not the c.140 different rates for experts' fees and other disbursements codified under legislation (c. 300 when including changes to most of these rates since 2011).

The LAA (and its predecessor) could make it easier for the provider and the court to know what is and is not covered by ensuring information is always exported to the funding certificate as a central record of cover:

a) Despite automatically allocating rates to all cases for the last 5 years, these have never been exported to the certificate;
b) Dates of remaining suspension of cover not shown upon revocation/discharge;
c) Prior authorities for counsel and experts' rates exceeding codified rates (which are not at the Court's discretion to allow) not always present;
d) Improve the certificates produced by CCMS, which are difficult to read as to scope with numerous boxes some of which show obsolete expiration dates e.g., superseded emergency cover.

The reduction of payment errors which led to the qualification of the LSC's accounts as identified in the National Audit Office's 2010 report was listed as a criterion of assessing success of the system which incorporates CCMS, provided by the Ministry of Justice. However, CCMS has not made the above information clearer to external actors including the body which has assessed many larger civil legal aid bills for decades. Rectifying this issue would directly improve the lack of accuracy in clams and court assessments and is long overdue.

If the LAA's intention is to use the CCMS for all claims, it is the ACL's view that the CCMS is not fit for the assessment of costs between £2,500 to £25,000 for the following, non-exhaustive reasons:

a) <u>CCMS bill reports are inadequate to enable an LAA case worker to effectively assess quantum</u>:

The data and way it is presented to an LAA case worker via CCMS does not allow them to properly carry out the costs assessment in terms of quantum. Unlike the prescribed requirements for court bills (both paper-based and electronic):

- there is no chronology of procedural steps such as hearings and witness evidence in these often protracted and complex cases;
- the line entries of work use archaic coding with no requirement for further explanation for most items;
- short letters and telephone calls, which can often run to 100s (40+ hours) on these larger bills, are not broken down into the numerous parties/actors present in these cases; this will result in one of two outcomes, either all communications will be allowed without adequate understanding or the communications will be arbitrarily reduced without explanation;
- There must be a separate document for the narrative and more importantly, for the explanation of line entries (where required) which the assessor must cross-reference with the digital time entries and expenses such as mileage;
- CCMS does not preserve the sequence in which the line items are presented on a claim once they are entered/uploaded to CCMS and does not provide a unique identifier for a line item on a claim. This results in random unindexed entries which are out of date order, meaning that that in addition to not being able to properly grasp the pattern (and reason for) work on a claim, the assessor cannot efficiently communicate which part of the bill they consider unreasonable. This problem has been acknowledged by LAA case workers. On claims with so many line entries, it is completely unworkable and will lead to

additional work for both the LAA caseworkers, ICAs and providers/costs professionals.

b) Unable to combine bill for multiple non-family certificates:

Multiple non-family certificates on the same case cannot be linked. Therefore, separate bills are required to be prepared, with line entries being split by time. It is not possible to prepare one bill and apportion the costs between the certificates as is possible in non-CCMS claims and bills. This causes duplication of remunerable bill preparation work, and the LAA case worker having to assess multiple bills.

c) No Defaults:

The inability to be able to set information (e.g. VAT rate and fee earner) for the claim which needs to be individually entered for every item creates additional cost that has to be paid by the Fund.

d) Bills where the client has a financial interest are inappropriate:

The document created to inform the client of their liability for costs is completely inappropriate to enable a sophisticated lay client to understand the document let alone vulnerable individuals to whom legal aid is provided.

e) Claims not submitted within 12 weeks (84 days) are deleted:

Larger non-fixed fee claims may be inactive for more than 12 weeks for many legitimate reasons. Using external software that integrates with CCMS is not a requirement, and once automatically deleted from CCMS, these claims have to be completely prepared again from scratch.

f) No contingency provided for billing if CCMS goes down:

CCMS has been blighted by issues with usability and system performance. The consultation states that CCMS makes for a resilient process but no provision is made for when CCMS goes down and providers have issues using the system or uploading documents. For example, during the pandemic, CCMS was completely down for a considerable period towards the end of June and through July 2020.

The proposals lack information in relation to the evidential requirements to support claims of £2,500 to £25,000. There is an obvious concern that there will be a proliferation of document requests or rejections which will increase the overheads for both the LAA and the providers. Despite this being a clear problem since the LAA took responsibility for court assessed bills, no evident review has taken place (no amended guidance has been issued).

4. CAPACITY OF THE LAA

The Consultation Document indicates that approximately 21,000 additional claims are proposed to be assessed by the LAA.

At paragraph 26 of the Consultation Document, reference is made to the benefits to legal aid providers of the swifter turnaround. Whilst this is welcomed, given that, as stated at paragraph 24, the bills have to be subject to a robust assessment process, there is concern about the number of bills being properly assessed in the much shorter turnaround time suggested.

At paragraph 3 of its further explanation published 8th April 2021 in response to certain requests for clarification and further information received from the Law Society by letter dated 16 March 2021 and the Bar Council by email dated 23 March 2021, the LAA say that they will not require any additional resource to carry out the increased work because they "already check the bill made by HMCTS". These checks, as detailed in the LAA's own internal guidance[3], are that the right rates have been used, the work is within the period legal aid cover was given and that the work relates to proceedings legal aid was provided for, and that the total sum allowed is within the capped amount ("costs limit") and if not then the claim to the LAA for payment of the bill must be limited to the costs limit. Utilising the number of court assessed bills which can be *checked* as to contractual compliance for payment as a benchmark to determine how many bills of up to £25,000 can be actually *assessed* is a false equivalence.

The data provided by the LAA in its *Additional Dataset – LAA Intake Resource and Performance* spreadsheet, shows that there is no additional time added after the first three months before the LAA switched from checking these claims to actually assessing them. That the target is to continue expecting 11.68 full time caseworkers (or the equivalent thereof) to each process 42.6 of these larger bills every week. This suggests that no further time has been provided to assess the quantum i.e. considering the facts of the case such as the procedural steps, the type and volume of evidence, any legal or factual complexity or novelty involved, and all other points common to judicial assessment of all legal costs, but merely check there is bespoke contractual compliance subject to audit by the NAO. Larger bills are generally more complex and it will inevitably take longer to assess both liability and quantum. There is concern that if the LAA caseworkers are required to assess Bills of up to £25,000 by targets designed for processing Bills already assessed, it will lead to rushing / mistakes and therefore increased rejections and appeals. It appears that the current common approach we have seen taken by the LAA to these particular bills, of allowing all costs other than 'big ticket' items, in particular enhancements, reflects this pressure on capacity.

Historically, to take on these assessments, the LAA have awaited Treasury approval for adequate funds to expand and train its team, but there is no mention of such funds rather this move is seemingly being made on the basis of releasing outstanding payment to providers and counsel significantly faster than if HMCTS is used as a body to assess the Bills; no explanation has been given for this change of position. If the numbers are as great as suggested, then more staff will inevitably be required to undertake the assessments which means incurring additional costs. This is not mentioned anywhere in the Consultation Document.

[3] Legal Aid Agency Civil Finance Electronic Handbook v3.1 page 106-107

5. LACK OF EXPERIENCE IN CASE WORKERS UNDERTAKING THE ASSESSMENTS

While, as detailed above in reply to the first Consultation question, the LAA assess some cases over £2500, it is the ACL's experience that the vast majority are low-value matters under £2,500 without significant complexity.

In response to concerns about whether LAA caseworkers have the requisite expertise to assess court bills, the LAA have previously stated that they were assessing high cost case plans in excess of £25,000. Comparing a court bill to a claim under a high cost case plan ("HCCP") is inappropriate because costs under HCCPs are dealt with more on a broad brush approach often with protracted discussion and increasing recourse to ICAs, as opposed to an item-by-item detailed assessment such as would take place in the cases between £2,500 and £25,000 value.

When assessing complex cases with bills of up to £25,000, the caseworker will need to determine what is reasonable and proportionate without reference to any pre-agreed/determined detailed budget. It is understood that the LAA assessors themselves have no legal experience to draw on when undertaking their assessments of complex legal processes where often an understanding of what happens in actual practice is a major benefit to an assessor.

Assessments by the Court are conducted by Judges / Officers being legal professionals experienced in exercising discretion, assessing costs of all values across inter partes and solicitor client costs, and also for the vast majority, in conducting and adjudicating upon legal proceedings; in many cases they have adjudicated the proceedings subject to assessment. Consequently, the Courts are acutely aware of the legal issues, everyday practical problems arising during the litigation process and especially the work required for all manner of proceedings due to their own extensive practical experience as practising lawyers. This allows them to consider and establish the issues in play shown on a bill and the effect on the costs incurred and claimed. It is of concern that work which is undertaken by specialist practitioners is then assessed by inexperienced non-lawyers who do not have the same depth and breadth of experience as the Court.

The knowledge and experience required in assessing costs and determining what is reasonable and proportionate, is an extremely high bar to meet and the ACL seek clarification as to what legal training and or experience the LAA caseworkers will be provided with to enable them to meet the required level of expertise.

If the LAA are to assess claims effectively and competently for hourly rate costs up to £25,000, it should possibly fall to the limited number of the more experienced caseworkers or a new team of more experienced assessors. The cost of providing this has not been specified in the Consultation Document which only states the amounts currently paid to HMCTS without stating the balancing figure of the actual cost to recruit and train new assessors, the costs of which, again, has not been stated.

There has always been a noticeable difference between assessments carried out by the LAA and the courts, where LAA caseworkers frequently disallow items that are reasonable and proportionate. Since August 2020, the ACL's experience indicates that simple, lower value claims over £2,500 are being processed without any issue, however, survey of the

membership indicates concern that this is a short-term approach and, if the proposal were to be implemented, the LAA's approach may change such that arbitrary and / or unreasonable reductions become commonplace with overreliance on appeals to correct this. Furthermore, the ACL LAG have found that the more complex and higher value claims are being reduced in areas such as time and enhancement for seemingly trivial and, in some cases, incorrect reasons. The assessment of enhancements claimed for work which is out of the ordinary requires an understanding of the criteria in generic costs assessments to utilise total discretion; every case is fact specific and knowledge and experience of both the practicalities of running a case and costs law is key.

The cases concerned have largely been appealed and the greater number have been fully restored to the full amounts claimed thus adequately exemplifying the point that the assessors do not possess the experience or ability required to process the more complex, higher value matters.

An increase in the number of cases taken to an appeal to Independent Costs Assessors (ICA) has to be absorbed as an overhead by the provider/counsel which is an unreasonable loss and is in addition, to the increased costs to the LAA both in terms of caseworker time and the cost of an ICA.

FROM YOUR EXPERIENCE ARE THERE ANY GROUPS OR INDIVIDUALS WITH PROTECTED CHARACTERISTICS WHO MAY BE PARTICULARLY AFFECTED, EITHER POSITIVELY OR NEGATIVELY, BY THE PROPOSALS IN THIS PAPER? WE WOULD WELCOME EXAMPLES, CASE STUDIES, RESEARCH OR OTHER TYPES OF EVIDENCE THAT SUPPORT YOUR VIEWS.

Where a legally aided client is required to pay some or all of their legal costs (e.g. they have higher means or recover an asset/money) they have a financial interest in the outcome of the assessment. Where the value of the costs exceed £25,000, the matter would be subject to a HCCP (budget) which the client would have had sight of during the course of the substantive action. Thus, the lay client is able to influence the level of costs / work done in relation to that matter.

For most cases where the costs are more than £2,500 and not subject to a HCCP, the client may only find out the full value of the claim once the case has concluded. Under the current regime, the legally aided client has the right to object to the costs and have those objections heard by a completely independent Judge. Whereas, the LAA are not entirely and objectively independent in deciding how much the legally aided client ought to pay.

In carrying out assessments on cases where the legally aided client has a financial interest, the LAA are taking on a quasi-judicial role dealing directly with members of the public. Whilst a legally aided client challenging a court assessed bill would ordinarily have the right to be heard in court, the LAA's current procedure involves written submissions which are effectively considered behind closed doors[4]. Furthermore, any appeal against the LAA decision appears to be entirely dependent upon the provider appealing the decision[5] and is also to be dealt with on the papers unless the LAA decides to refer the matter to an ICA; only then can a client

[4] 2018 Standard Civil Contract General Specification 6.58 and LAA Costs Assessment Guidance 16.4
[5] *ibid* at 6.71 and 16.10-16.11

attend the appeal, however there is no express right given for them to give oral submissions[6]. How many (if any) of these in person appeals take place each year is unknown. Further, there are neither provisions for the client to receive copies of any further written representations which the LAA and provider can make to the ICA, nor for the client to make further written submissions in reply to these. Whilst exceptional circumstances might justify an oral hearing for the appeal, it is significantly worrying that there is no automatic right for the legally aided client to make their own appeal or to be heard in an appeal that is sought by the provider.

This process is already far from ideal for claims regarding issued proceedings with assessable costs below £2,500, but it will now deal with assessments of up to £30,000 including VAT, and there is serious concern that it will not be adequately open and transparent for members of the public who must pay some or all of such significant amounts of money.

To date, the LAA has not taken any steps to amend the process[7]since it started assessing bills exceeding £2,500 in June 2020 and there has been no proposed change to guidance about this issue. This also raises serious concerns regarding the LAA's ability to provide access to justice when taking on a quasi-judicial role. If the proposals proceed, the lay client will lose the right to have their objections heard by a completely independent, impartial and experienced Judge in a manner which is entirely transparent and open.

Furthermore, the current method of challenging a bill subject to assessment by the LAA is not suitable for all legally aided clients, many of whom will be vulnerable and may have protected characteristics under the Equality Act, because it requires the submission of written objections and prevents the legally aided client from having their objections heard in person; this process may discriminate against those with protected characteristics. It is not clear if the LAA have the facilities and procedures in place to deal with any oral objections raised by legally aided clients. If it does not, then this could prevent access to justice in terms of the costs they are liable for. In current circumstances this is around the client's access to devices and internet to attend remote hearings, but post-Covid this will concern providing a hearing which a client can easily travel to.

The current format of court assessed bills provides detailed information on how the costs have been calculated – it sets out all the parties, the number of letters / calls to each party, it details the content of calls and attendances and clearly groups and details all preparation time. CCMS bill reports contain less information because all routine correspondence is combined and descriptions only required for 'other' items. The format of CCMS claims will make it harder for lay clients to challenge the costs incurred and impedes their access to justice.

WHAT DO YOU CONSIDER TO BE THE EQUALITIES IMPACTS ON INDIVIDUALS WITH PROTECTED CHARACTERISTICS OF EACH OF THE PROPOSALS? ARE THERE ANY MITIGATIONS THE GOVERNMENT SHOULD CONSIDER? PLEASE GIVE DATA AND REASONS.

The consultation does not set out the operational process to be applied if the proposal is to be implemented. Without knowing the operational process intended to be implemented, it is not possible to assess whether the proposal will directly or indirectly discriminate against any group or individuals with protected characteristics.

[6] LAA Costs Assessment Guidance 16.11
[7] 2018 Standard Civil Contract General Specification 6.58, 6.71-6.81

If it is intended that all claims be submitted through the CCMS, it is foreseeable that the proposal may discriminate against providers and the legally aided clients who have protected characteristics e.g. mental or physical disability, particularly where the statutory charge applies and/or the client is (or may be) required to make a contribution towards their legal costs because of their level of means.

WHAT DO YOU CONSIDER TO BE THE IMPACTS ON FAMILIES OF THESE PROPOSALS? ARE THERE ANY MITIGATIONS THE GOVERNMENT SHOULD CONSIDER? PLEASE GIVE DATA AND REASONS.

There is a serious risk that the already fragile legal aid service available to families in certain less densly populated areas of the country will find even more difficulty finding a legal aid solicitor to take on their case. If the solicitors fail to cover their costs of providing legal aid services at properly remunertated rates which may include the allowace of enhancements for the cases they deal with they will cease undertaking such work. This is already evidenced by the statistical evidence published by the LAA on a bi-monthly basis from which is is clear that in all categories of law there are significant reductions in the number of providers in each category ranging from 4 to 15% reductions in the few remaining areas of law unaffected by the imposition of LASPO in 2013. This is clear evidence of the impact on vulnerable families and the only mitigation that the government should take into account is the provision of a less complex and properly remunerated legal aid system.